IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-185

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD INDIAN RESERVATION, et al.,
Petitioners,

v.

JAMES M. NAMEN, et al., AND THE CITY OF POLSON, MONTANA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR AMICUS CURIAE CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION

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INTEREST OF AMICUS CURIAE

This brief is filed with the consent of all parties.

Amicus is a federally recognized Indian tribe occupying a reservation which encompasses 1.3 million acres in the eastern portion of the State of Washington. The reservation was established by President Grant in the Executive Order of July 2, 1872 (1 Kappler 916), and is governed by the Colville Business Council under the Constitution and By-Laws approved February 26, 1938.

Like the Petitioners, the Colville Confederated Tribes comprise a number of separate tribes who formerly occupied a vast area in the State until they gave up their original homelands to be moved onto a reservation. That reservation was later diminished to its present size. *See, Antoine v. State of Washington,* 420 U.S. 194 (1975).

Included within the exterior boundaries of the Colville Indian Reservation are a number of bodies of water, including streams, rivers, lakes, and, in particular, half of the Columbia River as it borders the Reservation.

There are approximately 200,000 acres of fee patent land on the Reservation, much of which is adjacent to the waters of the Reservation.

The Tribes utilize the waters of the Reservation for economic development, the production of fish, and for tribally regulated and licensed fishing and boating.

Amicus is concerned that, if the decision of the Ninth Circuit Court of Appeals is allowed to stand, it will find that waters heretofore used and regulated by its governing body will be subject to unregulated use by non-Indians, never contemplated by the Tribes or their members.

QUESTION PRESENTED

Whether reservation lands held in trust by the United States for an Indian tribe can be used by a non-Indian for wharves, docks, breakwaters, and other structures without the consent of the tribe or the Secretary of the Interior and without express congressional authorization.

STATEMENT OF THE CASE

Amicus hereby adopts the statement as set forth in the Petition.

REASONS FOR GRANTING THE WRIT

I. The Ruling of the Ninth Circuit Court of Appeals Has Far-Reaching Effects on Indian Property Rights Throughout the Country

In a novel and unprecedented decision, the Ninth Circuit Court of Appeals for the first time has held in this case that a non-Indian property owner, whose land abuts tribal waters, may interfere with the tribe's use of its waters and, in fact, build a physical structure directly on tribally owned beds and waters.

The Ninth Circuit has done this without regard to the traditional canons of Indian law with respect to Indian water rights and the control of tribal property.

It must be remembered that this decision may not be limited to the facts of the instant case, but may have far-reaching effects on almost every Indian reservation. Amicus, like other Indian tribes, has relied on the established principle that non-Indian fee patent landowners within reservation boundaries do not receive riparian rights with the purchase of their lands. Such reliance has resulted in tribal economic development projects using waters and the beds of waters held by the United States for the tribes, and tribal fishing and recreation programs designed for the benefit of tribal members.

The extension of doctrines of riparian rights to reservation waters would be a major change in the view of the tribes and the United States as to the ownership and control of those waters.

In addition, the principle of the balancing of "equities" suggested by the court below was rejected recently in *Cappaert v. United States,* 48 L.Ed.2d 523, 534 (1976). The effect of the adoption of such a rule in this case clearly shows the significant impact of such a judicial aberration.

II. The Ruling of the Court Below Stands in Clear Opposition to Current Congressional and Judicial Policies

The opinion of the court below shows a complete disregard for the policies determined by Congress and given effect by the courts within the last decade. The Ninth Circuit attempts to distinguish the recent series of Supreme Court and courts of appeals decisions in favor of tribal regulation and control of their own reservations by stating that such cases did not deal with riparian rights and, therefore, were inapplicable. This offhand rejection of congressional policies, as well as the decisions of this Court, cannot stand.

In the Indian Self-Determination and Education Assistance Act of 1975 (Public Law 93-638), Congress provided for greater participation of Indian tribes in programs and services theretofore conducted by the federal government and, in doing so, found:

> (2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.

Congress went on to declare its policy to establish a

> . . . meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people

> in the planning, conduct, and the administration of those programs and services.

Similarly, in *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 172 (1973), this Court stated that the doctrine of tribal sovereignty provided the "backdrop" against which all federal Indian legislation must be interpreted. Despite the attempt by the court below to distinguish this case as a "tax case", there is no indication that this statement of policy was not meant by this Court to apply to all statutes affecting Indian rights and status.

Likewise, in *United States v. Mazurie,* 419 U.S. 544, 557 (1975), which considered whether Congress could delegate its legislative power over non-Indians on fee patent land to an Indian tribe, the Court stated:

> Thus, it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members *and their territory.* [Emphasis added].

In *Williams v. Lee,* 358 U.S. 218, 223 (1959), this Court noted, in holding that the Navajo Tribe had jurisdiction over matters on the reservation, that:

> The cases in this Court have consistently guarded the authority of Indian governments over their reservations.

The Ninth Circuit upheld the jurisdiction of Indian tribes over non-Indians committing acts within the exterior boundaries of an Indian reservation in its recent decision in *Oliphant v. Schlie,* ..... F.2d ....., No. 74-2154 (9th Cir., August 24, 1976). The Ninth Circuit restated the rule that Indian tribes retain whatever original sovereign powers they had unless those powers were specifically limited by acts of Congress.

Finally, in *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 48 L.Ed.2d 96 (1976), this Court rejected the notion that the fee patent status of allotted land is a basis for establishing by implication any difference in jurisdiction over the property. This Court in that case noted that the policy of allotment was repudiated by the Indian Reorganization Act of 1934, 48 Stat. 984, and that any analysis of the effect of allotment must be viewed in light of this repudiation.

The decision below in this case would make the right of the tribe to control the shoreline and waters of its lake property dependent upon the status of the ownership of the uplands, thus resulting in the "impractical pattern of checkerboard jurisdiction" rejected by this Court in *Moe, supra.*

Thus, the most recent pronouncements of congressional policy and judicial interpretations fully support the right of Indian tribes to regulate and control personal and property matters within the exterior boundaries of their reservations. The opinion of the court below denying such a right must therefore be seen as violative of this policy and should be reversed.

III. The Decision Below Misinterprets the Trust Relationship of Indian Tribes and the United States Government in Denying the Applicability of Tribal Law to the Use of Tribal Property

In an unsupported analysis of what law should apply to determine the riparian rights of the lands in question, the court below rejected the argument that, like a state upon admission to the Union, a tribe has full jurisdiction over control of the bed and banks of the lake. The court held that the tribe was not in the same position as a state, but

was like a territory since the United States was holding the lands and waters in trust for the tribe. The court found that the tribe has a less valuable form of ownership of the bed and banks of its navigable waters than a state would have because legal title is held by the United States.

This decision departs radically from accepted principles of Indian law. Unlike both states and territories, the original ownership of all of the lands and waters involved was exclusively in the tribe. Upon the creation of the trust relationship between Indian tribes and the United States Government, the tribe granted to the United States naked legal title for the purposes of administering the property and protecting the Indian wards. Thus, the grant of property was not one *from* the United States to the tribes, but rather a reservation of ownership rights by the tribe with legal title being given to the United States solely for the purpose of its exercising its role as guardian.

Both the United States and Indian tribes have always regarded the holding of Indian property in trust for tribes and their members as a superior form of ownership of property because it protected such property from being depleted. It must be remembered that the trust relationship between the United States and Indian tribes is a unique one which exists no where else in the law. To liken the United States Government's ownership of legal title of Indian lands in its role as trustee to its proprietary ownership of its own federal lands, thus resulting in the application of federal, and not tribal, law in this case "would not be an exercise of guardianship, but an act of confiscation." *United States v. Creek Nation*, 295 U.S. 103, 110 (1935).

Under the law of the State of Washington, the upland owner in a situation such as the instant case does not have a riparian right of wharfage or dockage. However, under the doctrine enunciated by the court below, a non-Indian owner of uplands on a body of Colville tribal water would

get that right. This would result in an encumbrance on tribal waters and on the United States' trusteeship that would not have occurred had the tribe not requested that the United States exercise protective control of the tribal property. Such a situation surely was not in the contemplation of the United States or the Indian tribes.

CONCLUSION

The arguments presented by Petitioners, as well as the additional arguments presented by Amicus, compel review of the decision of the Ninth Circuit Court of Appeals by this Court. To allow the decision below to stand would be to sanction an unprecedented derogation of the trust responsibility exercised by the United States for the benefit of Indian tribes. Such a decision will have far-reaching deleterious effects on the remaining areas of Indian tribal property throughout this country. The decision below is at odds with the Indian policies of the United States Government, as well as the most recent court decisions regarding these matters.

For these reasons, this Court should grant the Petition for a Writ of Certiorari and reverse the decision of the Ninth Circuit Court of Appeals and should hold that reservation lands held in trust by the United States for an Indian tribe are not subject to rights of a non-Indian to build structures without the consent of the tribe and without express congressional authorization.

DATED this 16th day of September, 1976.

Respectfully submitted,

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